EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

6/18/87

NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

MIGUEL ESPINOZA, the Respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46.1 of this Court, and to file herein his response to the Petition for Writ of Certiorari in the United States Court of Appeals for the Seventh Circuit in single counterpart, without printing same. The typed Brief of Respondent in Opposition is presented herewith for filing.

Leave to proceed in forma pauperis was not sought in any court below.

The United States Court of Appeals for the Seventh Circuit appointed counsel for Respondent under Title 18, United States Code, Section 3006A(d)(6), the Criminal Justice Act of 1964. Therefore, no Affidavit is filed herewith.

Respectfully submitted,

Tammi K. Franke
William H. Wise *
Counsel for Respondent

*Counsel of Record

WILLIAM H. WISE
180 North LaSalle Street
Suite 3110
Chicago, Illinois 60601
(312) 346-4555

NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Tammi K. Franke
William H. Wise *
180 North LaSalle Street
Suite 3110
Chicago, Illinois 60601
(312) 346-4555

Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

I.

Should this Court's decision in Michigan vs. Jackson, 475 U.S. ____, 106 S.Ct. 1404, 89 L.Ed 2d 631 (1986) be applied retroactively to collateral review of final convictions?

II.

Whether a suspect's confession to murder should be suppressed, under Edwards vs. Arizona, 451 U.S. 477 (1981), because it was obtained at a government initiated, custodial interrogation after the suspect had invoked his right to counsel at an arraignment on another charge and had remained in continuous, physical custody from the initial arrest until the interrogation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Miguel Espinoza, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 813 F.2d 117.

STATEMENT OF THE CASE

On August 29, 1980, Chicago police officers arrested Miguel Espinoza, respondent, on a charge of unauthorized use of weapons. Espinoza awaited trial in Cook County jail from August 29, 1980 until September 3, 1980. During this time, a public defender was appointed to represent Espinoza and appeared on his behalf at his arraignment on the weapons charge.

While Espinoza remained in custody, the police analyzed the gun taken from him at the time of this arrest and concluded that it had been used to kill Frank Foy, Jr. On September 3, 1980, Espinoza was taken by police investigators from jail to the Cook County State's

Attorney's Office for questioning. No attempt was made to contact or notify Espinoza's attorney.

Assistant State's Attorney, Brian Collins, questioned Espinoza regarding the murder. He was aware that Espinoza was in custody on the weapons charge, but he did not ask Espinoza if he had a lawyer.

Collins questioned Espinoza in English. He did not ask Espinoza, a native Mexican, if he could speak English or if he needed an interprete Espinoza responded to Collins' questioning in English. However, his responses consisted primarily of "yes" and "no." Espinoza confessed that he and two of his friends had murdered Frank Foys after only 15 to 20 minutes of questioning.

The next morning a complaint, based on Espinoza's confession, was filed. The State dropped the weapons charge.

Espinoza was not tried for a year and a half. The trial judge initially ordered Espinoza held in jail pending a psychiatric evaluation of his competence to stand trial. While in jail, Espinoza attempted suicide. He was then placed in Chester Mental Health Center where five different mental health professionals examined Espinoza over the ensuing year and a half. Four of the five found Espinoza mentally unfit to stand trial.

On March 3, 1982, a full hearing was held to determine whether Espinoza was capable of standing trial. One psychiatrist testified that he had given Espinoza an electroencepalogram and it showed no abnormalties. Therefore, be believed that Espinoza was pretending to be mentally ill. Another psychiatrist testified that Espinoza was unfit to stand trial because he suffered from a depressive neurosis that prevented him from caring about his well-being and, thus, rendered him unable to cooperate with his attorney. Throughout the hearing, Espinoza mumbled unintelligibly.

At the conclusion of this hearing the State trial judge found Espinoza fit for trial and able to cooperate with his attorney.

Next, Espinoza moved to suppress his confession based on his fifth and sixth amendment right to counsel at the interrogation. In the

motion, Espinoza claimed that he had not understood the Miranda warnings; that mental illness had prevented him from being able to voluntarily waive his rights; and that the police had coerced him into confessing by putting him in a chair, placing wires on his head, and simulating an electrocution.

The trial judge denied the motion and found that Espinoza understood what happened at the interrogation and confessed voluntarily.

The following bench trial lasted less than one hour. Espinoza's confession was the State's principal evidence. The State introduced no additional testimony. Espinoza was found guilty at the end of the trial.

After exhausting all State remedies, Espinoza filed a Petition for Writ of Habeas Corpus in federal district court. The district court granted the petition and held that Espinoza's fifth amendment right to counsel had been violated during the interrogation based on the rule set forth in Edwards vs. Arizona, 451 U.S. 477 (1981). The court also found that Espinoza had a sixth amendment right to counsel which had been violated. The court concluded that Espinoza's limited education, his preference for speaking Spanish, the short period of time between being informed that he was a suspect and his confession, and his mental condition at the time of interrogation, indicated that he had not knowingly and voluntarily waived his sixth amendment right to counsel.

The circuit court affirmed on fifth amendment grounds. The court concluded that, because Espinoza had invoked his fifth amendment right to counsel at his arraignment, the State was barred, under Edwards, from initiating any interrogation while Espinoza remained in continuous custody. Because the State concedes that it initiated the interrogation, the circuit court found that Espinoza was constitutionally incapable of waiving his right to counsel and that the State violated Espinoza's fifth amendment right to counsel.

REASONS A WRIT OF CERTIORARI SHOULD BE DENIED

I.

THIS COURT HAS ALREADY APPLIED MICHIGAN VS. JACKSON, 475 U.S. _____ 106 S.Ct. 1404, 89 L.Ed. 2d 631 (1986), RETROACTIVELY TO THE COLLATERAL REVIEW OF A FINAL CONVICTION.

In Murphy vs. Holland, _____ U.S. _____, 106 S.Ct. 1787, 90 L.Ed. 2d 334 (1986), this Court vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case for further consideration in light of Michigan vs. Jackson, 475 U.S. _____, 89 L.Ed 2d 631, 106 S.Ct. 1404 (1986). Murphy vs. Holland, 776 F.2d. 470 (4th Cir. 1985), was a collateral review of a final conviction.[1]

Because this Court has already asked the Fourth Circuit to apply Michigan vs. Jackson retroactively in Murphy vs. Holland, the issue of retroactivity should not be "a vital concern for the lower courts." (Pet., p. 7). Therefore, it is unnecessary for this Court to decide the first Question Presented.

II.

PETITIONER'S QUESTION CONCERNING THE RETROACTIVITY OF MICHIGAN VS. JACKSON, 475 U.S. _____ 106 S.Ct. 1404, 89 L.Ed. 2d 631 (1986) WAS NOT RAISED BELOW.

Petitioner and respondent argued this case before the United States Court of Appeals for the Seventh Circuit on April 8, 1986 and the Seventh Circuit decided it on February 25, 1987. This Court decided Michigan vs. Jackson on April 1, 1986, seven days before oral argument but after briefing was completed below.

The Seventh Circuit raised the Michigan vs. Jackson case at oral

[1] On March 6, 1980, Murphy was convicted in the Circuit Court of Braxton County, West Virginia. Murphy exhausted his state remedies and then petitioned the federal district court for habeas corpus relief. The writ was denied on July 31, 1984. He then appealed to the United States Court of Appeals for the Fourth Circuit which rendered the opinion in Murphy vs. Holland, 776 F.2d. 470 (4th Cir., 1985).

argument and asked both petitioner and respondent to discuss its applicability. However, the petitioner did not raise the retroactivity issue at oral argument nor did he seek to brief the court on the issue.

In U.S. vs. Ortiz, 422 U.S., 891, 898 (1975), this Court declined to consider a similiar issue because it was raised for the first time in the petition for certiorari. Likewise, this Court should decline to consider the issue of the retroactivity of Michigan vs. Jackson because it was raised for the first time in the petition for certiorari.

III.

MICHIGAN VS. JACKSON DISTINGUISHES THE DECISION IN THIS CASE FROM CONFLICTING DECISIONS IN OTHER CIRCUITS.

Petitioner claims that the Seventh Circuit decision in this case departed from the decisions of other federal courts because it determined that Espinoza's request for counsel at his arraignment invoked his fifth amendment right to counsel.[2] However, the Seventh Circuit correctly distinguished the decisions in the other circuits because they were decided before Michigan vs. Jackson (App. 12, n.5).

The Seventh Circuit noted that it knew of only three cases that have ever considered whether individuals who invoke the right to counsel at their arraignments are invoking both their fifth and sixth amendment rights. Two of these three cases were decided by the Fifth Circuit before Michigan vs. Jackson. See Jordan vs. Watkins, 681 F.2d 1067 (5th Cir.), reh'g denied sub. nom. Jordan vs. Thigpen, 688 F.2d 395 (1982), and Blasingame vs. Estelle, 604 F.2d 893 (5th Cir., 1979).[3]

---

[2] The record is unclear concerning the circumstances under which a public defender was appointed. The record shows that a public defender was appointed at some point between August 29 and September 3, 1980, and appeared at Espinoza's arraignment on the weapons charge (see Pet., p.4, App. 2, and App. 22).

[3] But see, Silva vs. Estelle, 672 F.2d, 457 (5th Cir., 1982) where the Fifth Circuit reached the opposite result and held that a request by a defendant for permission to call his attorney at his arraignment was an invocation of his fifth amendment right to counsel. See also, People vs. Bladel, 365 N.W. 2d 56, 64 (Mich. 1984), where the Michigan Supreme Court states that the Fifth Circuit has reached conflicting results on this issue because it has not adequately distinguished the fifth and sixth amendment rights to counsel.

Both cases limited a defendant's request for counsel at arraignment to an invocation of his sixth amendment right to counsel. The Eleventh Circuit came to a similar result in a pre-Michigan vs. Jackson case, Collins vs. Francis, 728 F.2d 1322 (11th Cir.) (per curiam), cert, denied, 469 U.S. 963 (1984). reh'g denied, 469 U.S. 1143 (1985).

This Court's decision in Michigan vs. Jackson would dictate a different result in these cases if they were decided today:

> We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:
>
> "Although judges and lawyers may understand and appreciate the subtle distinctions between the fifth and sixth amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he ddoes not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."
>
> 475 U.S. at _____, 106 S.Ct. at 1409, n. 7, 89 L.Ed. 2d at 641, n. 7 (quoting the Michigan Supreme Court, People vs. Bladel, 421 Mich., at 63-64, 365 N.W. 2d at 67.)

In fact, the Fourth Circuit, relying on Michigan vs. Jackson, recently held, as did the Seventh Circuit, that a defendant invoked both his fifth and sixth amendment rights to counsel when he indicated at his arraignment that he wanted counsel. Wilson vs. Murray, 806 F.2d. 1323 (4th Cir., 1986).

The two Circuit - the Fourth and the Seventh - that decided this issue after this Court's opinion in Michigan vs. Jackson have acted in concert. The conflicting decisions by two Circuits - the Eleventh and the Fifth - were decied without the guidance of Michigan vs. Jackson.

Accordingly, this Court's decision in Michigan vs. Jackson has resolved any conflicts in the circuits. It is unnecessary to grant the petition for certiorari because the Seventh Circuit's opinion in this

case conflicts with the Fifth and Eleventh Circuit's pre-Michigan vs. Jackson decisions.

IV.

THE FACTS OF THIS CASE ARE UNIQUE AND DO NOT WARRANT REVIEW BY THIS COURT.

The petitioner argues that "there are compelling reasons to reject a per se rule in this particular case." (Pet. at 10) (emphasis added). This argument falls short because it is not the policy of this Court to grant a petition for a writ of certiorari based on the applicability of a particular rule (Edwards) to the facts of a "particular case."

Indeed, the Seventh Circuit in its opinion indicated that the facts of this case are unique:

> In the ordinary criminal prosecution, the defendant invokes his or her fifth and sixth amendment rights to counsel sequentially.... In this case, Espinoza did not invoke his rights to counsel in the usual sequence.... [ ] In the ordinary case, once the state has begun to prosecute an individual, attention is focused on the sixth amendment right to counsel. (App. at 5, 14) (emphasis added).

In addition, the fact that Espinoza was arraigned on an offense unrelated to the murder charge to which he ultimately confessed narrows the issues in this case even further. And the unrelated offense is the only fact that differentiates this case from this Court's recent opinion in Michigan vs. Jackson.

Furthermore, the Seventh Circuit set forth four very specific questions in its opinion (App. 6). Each of these questions had to have been answered affirmatively in order for the court to rule in favor of Espinoza. (app. 6). Each of these specific questions turned on the specific facts of this case and would not have a broad applicability.

Finally, the Seventh Circuit's well-reasoned opinion correctly applies this Court's opinions in Michigan vs. Jackson and Edwards to any interrogation of suspect who has invoked his fifth amendment right to

counsel and remains in continuous custody from the time of the invocation until interrogation. Such an application does not "create an unprecedented immunity for offenders fortuitously charge with unrelated crimes," (Pet. p.13) but rather protects these suspects, in the same manner as any suspect in police custody, from the "heightened potential for state-coerced self incrimination" (App. 15).

CONCLUSION

For these reasons, respondent respectfully requests this Court to deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Tammi K. Franke
William H. Wise *
180 North LaSalle Street
Suite 3110
Chicago, Illinois 60601

*Counsel of Record

May 28, 1987

NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

CERTIFICATE OF SERVICE

I, WILLIAM H. WISE, a member of the Bar of the Supreme Court of the United States and counsel of record for MIGUEL ESPINOZA, Respondent herein, certify that on May 28, 1987, pursuant to Rule 28.3, Rules of the Supreme Court, I served one copy of the attached Motion For Leave to Proceed in Forma Pauperis and one copy of the attached Brief of Respondent in Opposition to the Petition for Writ of Certiorari on each of the parties herein, as follows:

On James W. Fairman, Petitioner, by depositing such copies in the United States Post Office, Chicago, Illinois, with first class postage prepaid, properly addressed to the Post Office address of Sally L. Dilgart, the above-named Petitioner's counsel of record, at 100 West Randolph Street, 12th Floor, Chicago, Illinois, 60601.

All parties required to be served have been served.

May 28, 1987
Dated

William H. Wise
WILLIAM H. WISE

Subscribed and Sworn to before
me this 28th day of May, 1987.

Notary Public
NOTARY PUBLIC

WILLIAM H. WISE
180 North LaSalle Street
Suite 3110
Chicago, Illinois 60601
(312) 346-4555